

*United States Court of Appeals
for the
District of Columbia Circuit*



**TRANSCRIPT OF
RECORD**

138

IN THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA, :
Appellee :
v. : NO. 24,430
ROOSEVELT SCARBOROUGH, JR., :
Appellant :

BRIEF ON BEHALF OF APPELLANT

United States Court of Appeals
for the District of Columbia Circuit

ANTON M. WEISS
Suite 807
1625 Eye Street, N. W.
Washington, D. C. 20006
Telephone: 223-1808

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Attorney for Appellant
Appointed by this Court

Nathan J. Paulson
CLERK

Issue *

1. Whether the District Court erred in permitting the government to impeach a defense witness with a thirteen-year-old conviction for forgery and uttering.
2. Whether the District Court erred in instructing the jury that "there is no argument that Mrs. Robinson's house was burglarized" and "I charge you that the pocketbooks in Mrs. Robinson's bedroom were in her possession."

* In accordance with Rule 8D of the Rules of this Court, this case has not been before this Court previously under the same or similar title.

References and Rulings: None

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v.

NO. 24, 430

ROOSEVELT SCARBOROUGH, JR.,

Appellant

BRIEF ON BEHALF OF APPELLANT

Statement of the Case

This is an appeal from appellant's conviction of first degree burglary (22 D.C. Code 1801A) and petit larceny (22 D.C. Code 2202). On June 11, 1970, appellant was sentenced pursuant to the provisions of 18 U.S. Code 5010B, the Federal Youth Corrections Act.

The relevant facts of this case can be briefly stated. Mrs. Sarah Robinson, the complaining witness, testified that in the early morning hours of October 3, 1969, she was awakened by the sound of whispering voices. Looking up, she observed several persons whom she recognized as boys who lived in the neighborhood,

rumaging through her bedroom. After shouting at them, the intruders departed hastily, taking with them some pocketbooks which were on the dresser.

After the police arrived, she searched the neighborhood with them and at one point actually saw appellant but did not identify him to the police who were with her. (Tr. 101)

Appellant and the co-defendants presented alibi defenses which were unrelated to each other. Appellant and members of the Russell family, who were neighbors both of appellant and the complaining witness, testified that appellant was at their home playing a game at the time of the alleged offense. Prior to the testimony of Dorothy Russell, one of the aforementioned witnesses, the prosecutor approached the bench and advised the Court that he wished to impeach her with a 1957 conviction for forgery and uttering. Defense counsel objected on the grounds that the conviction was thirteen years old. (Tr. 262) The prior conviction was introduced over counsel's objection. (Tr. 317-318)

In charging the jury the Court instructed as follows: "The burden is on the Government to prove beyond a reasonable doubt not only that an offense was committed as alleged in the indictment --and there is no argument that Mrs. Robinson's house was burglarized--but also that the defendants are the persons who committed the offenses. (Tr. 383) Emphasis supplied.

After instructing the jury on the law of possession, the Court added the following:

"I charge you that the pocketbooks in Mrs. Robinson's bedroom were in her possession." (Tr. 386)

This latter instruction was specifically objected to.
(Tr. 389)

The jury returned a verdict of guilty as to both counts on all defendants.

Summary of the Argument

1. The Trial Court's ruling that defendant's alibi witness could be impeached with a thirteen-year-old conviction was improper because, although the conviction was for a crime relating to honesty, it was so remote that it should have properly been excluded.
2. The portions of the Trial Court's instruction which charged the jury that (a) the fact that a burglary had taken place was not in dispute; and, (b) the pocketbooks taken from the complaining witness's bedroom were in her possession, amounted to error. The law is clear that the Trial Court can never instruct a jury as to how to find the facts of the case regardless of how overwhelming the evidence is.

Argument

1. The Court below improperly permitted the government to impeach defendant's alibi witness with a thirteen-year-old conviction for forgery and uttering.

In 1965 this Court held in a landmark case that a trial judge must exercise discretion in permitting the government to impeach defendants with prior convictions. Luck v. United States, 121 U.S.App.D.C. 151, 348 F.2d 763 (1965).

The Luck ruling was amplified in another landmark decision wherein the Court held, "The nearness or remoteness of the prior conviction is also a factor of no small importance. Even when fraud or stealing, for example, if it occurred long before and has been followed by a legally blameless life, should generally be excluded on the ground of remoteness." Gordon v. United States, 127 U.S.App.D.C. 343, 383 F.2d 936 (1967).

"The ruling establishing a discretion in the trial judge (to permit impeachment by prior convictions) is applicable to all witnesses." Furthermore, "there is wide room for application of the doctrine of Luck and its progeny to witnesses other than criminal defendants..." Davis v. United States, 133 U.S.App.D.C. 167, 409 F.2d 453 (1967).

Appellant concedes that forgery is a criminal act which relates to the credibility of a witness; however, Gordon clearly holds that where the conviction was remote in time and followed by a legally blameless life, as it was in the instant case, the impeachment of a defendant by such a conviction should not be allowed. The Davis case established the principal that the aforementioned standard applies to witnesses in general, and not just defendants. Therefore, the Court clearly erred in permitting impeachment of defendant's witness with the 1957 forgery and uttering conviction.

2. The Court below erred in instructing the jury that, "there is no argument that Mrs. Robinson's house was burglarized" and "I charge you that the pocketbooks in Mrs. Robinson's bedroom were in her possession."

In a recent case a defendant presented an alibi defense. The Trial Court instructed the jury that if they found that the defendant was present at the scene of the offense, that the jury must find him guilty. This Court held that "The rule that a directed verdict of guilty is invalid is enforced no matter how conclusive the evidence in the case may be." United States v. Hayward, 420 F.2d 142 (1969)

This case presents a remarkable analogy to the Hayward case. As in Hayward appellant also presented an alibi defense and as in Hayward the rest of the Court's instructions were proper.

The government in Hayward argued "harmless error." This Court rejected that argument. Citing Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), the Court held that "'there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.'"

The entire point of Hayward is that no matter how conclusive the proof is on a particular point, the Trial Court cannot instruct the jury as to how it should find on that point. Because trial by jury is such an important and fundamental right, the fact that the Trial Court's error may be highly technical will not obviate the necessity for a reversal.

The government in Hayward argued "harmless error." This Court rejected that argument. Citing Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), the Court held that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error."

The entire point of Hayward is that no matter how conclusive the proof is on a particular point, the Trial Court cannot instruct the jury as to how it should find on that point. Because trial by jury is such an important and fundamental right, the fact that the Trial Court's error may be highly technical will not obviate the necessity for a reversal.

Conclusion

For the aforementioned reasons it is respectfully submitted that this Court should reverse appellant's conviction and remand the case to the United States District Court with directions to grant appellant a new trial.

Respectfully submitted,

Anton M. Weiss
1625 Eye Street, N. W.---suite 807
Washington, D. C. 20006
223-1808
Attorney for Appellant
Appointed by this Court

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief for Appellant were deposited at the Office of the Clerk of the Court of Appeals for transmission to the United States Attorney's Office this _____ day of _____, 1970.

Anton M. Weiss